
CANADA / JUDGMENT

Ladner v. Ladner

2004 BCCA 366

COURT

British Columbia Court of Appeal

DECIDED

28 June 2004

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2004 BCCA 366 Ladner v. Ladner

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Ladner v. Ladner,

2004 BCCA 366

Date: 20040628

Docket: CA028718

Between:

Julie Marjorie Ladner

Appellant

(Petitioner)

And

Hugh Graham Ladner

Respondent

(Respondent)

Before:

The Honourable Madam Justice Rowles

The Honourable Madam Justice Huddart

The Honourable Mr. Justice Oppal

S.H. Ashcroft and C. Sweet

Counsel for the Appellant

D.F. Gurney

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

1 April 2004

Place and Date of Judgment:

Vancouver, British Columbia

28 June 2004

Written Reasons by:

The Honourable Madam Justice Huddart

Concurred in by:

The Honourable Madam Justice Rowles

The Honourable Mr. Justice Oppal

Reasons for Judgment of the Honourable Madam Justice Huddart:

- [1] This appeal is from the latest of many orders made in family and estate proceedings following the parties' separation in June 1987 after a marriage of 9 1/2 years and the husband's accidental death in 1992 before division of family property was resolved. A lengthy discussion of these proceedings is not necessary because all of the reasons for all orders are reported or are available electronically on CanLII.
- [2] Suffice it to say the parties agree the estate is insolvent and that its only significant remaining asset is a portion of the proceeds of three insurance policies of which it was the named beneficiary, \$525,000 being held in trust under the terms of a court order. The appellant and her ex-husband's widow and children of his first marriage have been unable to reach an agreement as to how the estate should be distributed. The estate has spent about \$370,000 in administration costs, most incurred in defending the appellant's claims, and, we are advised, proposes to spend another \$200,000 in executors', legal and accounting fees before winding up the estate. The claims of creditors who are not family members total about \$50,000. The claims of a family holding company, L-One Holdings Ltd. ("L-One"), its wholly-owned subsidiary, Secret Resources Ltd. ("Secret"), and family members total about \$1,000,000. The executors' most recent proposal for distribution would see the appellant receive about 20% of the present value of her spousal support claim, or about \$100,000.

- [3] This appeal focuses on the appropriate remedy for the deceased's breach of his covenants in a separation agreement to pay permanent spousal support to the appellant and to maintain sufficient insurance to secure payment of that support in the event he was the first to die. It raises difficult questions at the boundary of contract and equity. Intuitively, it seems unfair that the appellant should be deprived of her ex-husband's life insurance proceeds by virtue of his having breached his obligation to maintain insurance with her as the named beneficiary, instead having made the proceeds payable to his estate and thus available for estate administration costs and to unsecured creditors.
- [4] The ultimate question on this appeal is whether the appellant is entitled to priority over the unsecured creditors of the estate by way of a contractual or equitable remedy. But the issue is not that straightforward, because only after she obtained a judgment for damages did the appellant put forward a claim for what I will call a "good conscience" equitable remedy, in the form of an equitable lien or constructive trust over the insurance proceeds. Moreover, the record is not clear whether Mr. Ladner owned the largest of the insurance policies, given that L-One paid the premiums on it.

Facts

- [5] In a separation agreement made in August 1987, Mr. Ladner agreed to pay spousal support sufficient to provide the appellant with a monthly income of \$2,340 "commencing on the 1st day of September, 1987 and continuing each month thereafter". At that time, the parties anticipated dividends from the appellant's 38% interest in L-One would provide most or all of that income within two years. Under the separation agreement, the amount of support was to abate by whatever amounts the appellant received from L-One.
- [6] As events unfolded, L-One paid no dividends after Mr. Ladner's death. Its only assets are its interest in Secret and a claim against the estate for about \$450,000, which amount it alleges Mr. Ladner took wrongfully from the company between 1989 and 1991. Secret's only asset is a claim against the estate for about \$267,000 plus interest, the proceeds of the sale of Secret's only asset, which asset the executors allege Mr. Ladner wrongfully assigned to CIBC to satisfy a personal liability. We are advised that Secret, as the assignee of a mortgage in favour of CIBC, claims more than \$100,000 in priority to the appellant's damage award and the claims of other creditors. While the appellant disputes some of the claims and the proposed distribution, she has acknowledged since late 1997 that the estate is insolvent.
- [7] Until his death, Mr. Ladner made whatever support payments were required, voluntarily until 31 December 1989, and thereafter under compulsion of court order. The estate has not made any support payments.
- [8] In the separation agreement, to secure his support obligation, Mr. Ladner had promised

to maintain life insurance on his life with the wife as named beneficiary, having a face value in an aggregate amount to cover his indebtedness with the Canadian Imperial Bank of Commerce and his obligations to the wife under this agreement.

- [9] Mr. Ladner satisfied the obligation to CIBC before his death. However, while he (or L-One) maintained life insurance policies during and after the marriage that would have been adequate to meet his obligation to the appellant, he did not name her as the beneficiary of any of them.
- [10] In light of Mr. Ladner's breach of his obligations under the separation agreement, the appellant sought judgment against his estate for \$450,000, being the proceeds the estate would have received from three insurance policies Mr. Ladner had taken out under the aegis of the Canadian Bar Association with Canadian General Life Insurance Company (now Westbury Life). The appellant believed Mr. Ladner had obtained those policies in 1987 to fulfill his covenant to maintain insurance to secure the CIBC obligation and her spousal support, then allowed them to lapse in December 1991 without notice to her and in breach of his further agreement to give her "the option to take over and continue" any life insurance coverage he decided to discontinue.
- [11] The trial judge rejected the appellant's claim because he did not interpret the separation agreement as requiring the payment of spousal support after 31 December 1989. On appeal, this Court set aside his order: *Ladner v. Ladner* (1997), 87 B.C.A.C. 253, 30 B.C.L.R. (3d) 144, 26 R.F.L. (4th) 443. At paras. 27 and 28 of his reasons, Esson J.A. explained:

The breach which crystallized on his death was of his obligation to maintain life insurance with his wife as named beneficiary having a face value sufficient to cover his obligations to her under the agreement.

In the context in which they appear, the words "obligations to the wife" in clause 7 can only refer to the obligation to pay maintenance in the amount of \$2,340.00 per month for life. The damages might be assessed as being the present value of that obligation from the date of his death were it not for the provision of clause 3 that his obligation was to be abated to the extent of monies received by the wife from her interest in L-One Holdings. There may be other contingencies to be taken into account. On the evidence before us there is no basis for assessing damages. That issue therefore must be remitted to the trial court for determination.

- [12] At some point after the release of those reasons in February 1997 and before 7 August 1997, it appears that the executors became aware the estate was, without regard to the appellant's claim, insolvent as a consequence of the claims of L-One and Secret. On 7 August 1997, one of the executors swore an affidavit to that effect. That affidavit was filed on the eve of the assessment of damages in support of an application in the estate proceeding to authorize the executors to pay legal accounts and to retain an accountant to give advice to L-One, Secret and another family holding company, L-Four Holdings Ltd. Scarth J. heard that application over three days beginning 20 November 1997, concurrently with the assessment of damages for Mr. Ladner's breach of the covenant to maintain insurance in favour of the appellant. In

his reasons released on 12 June 1998, Scarth J. noted "[a]pparently the estate is insolvent": *Ladner v. Ladner* (1998), 42 R.F.L. (4th) 46 at para. 44 (B.C.S.C.). Both parties had so acknowledged during the hearing.

- [13] It is convenient to note it was common ground the parties had agreed in 1987 to defer the division of family assets until Mr. Ladner's strained financial situation had improved. The appellant's claim under what is now Part 5 of the Family Relations Act, R.S.B.C. 1996, c. 128 began in 1990 and continued against the estate. It was considered at the same time and in the same action as her claim for damages for breach of the covenant to maintain insurance in her favour. As a consequence of the orders in that action, the appellant has received \$134,500, including her 25% share in the proceeds of two insurance policies found to be family assets, one for \$50,000 issued by Confederation Life and the other for \$200,000 issued by Aetna Life.
- [14] A third policy, placed by L-One with Great West Life in November 1988, was found not to be a family asset. It paid the estate \$400,000 on Mr. Ladner's death. As a consequence of an equal division of their shares of L-One, the appellant and the estate each have a 44.5% interest in the company, and therefore in Secret. The other 11% is owned by their children. Until his death, Mr. Ladner remained in sole control of L-One, although a term of the separation agreement required him to vote his shares to ensure the appellant remained a director.
- [15] Scarth J. assessed the appellant's damages at \$417,621, being the value at the date of Mr. Ladner's death (18 February 1992) of her spousal support entitlement under the separation agreement. He concluded it was inappropriate to take into account the remote possibility either L-One or its only asset, Secret, would be successful in obtaining any monies from the estate. He refused to make any deduction for income tax the appellant would notionally have had to pay had she received monthly support. He rejected the appellant's claim for punitive damages. To take account of the remote possibility L-One might obtain funds from the estate to distribute to its shareholders, he ordered the appellant to "assign to the Respondent Estate any monies received by her from her interest in L-One Holdings Ltd. to the extent her award of damages as against the Estate is satisfied".
- [16] The order was duly entered on 17 November 1998. Neither party appealed. However, in supplementary reasons given on 30 November 2001 (*Ladner v. Ladner* (2001), 23 R.F.L. (5th) 183, 2001 BCSC 1676), in response to a request he settle a dispute that had arisen between the parties about the application of the assignment order, Scarth J. explained at para. 16:

Although the estate's obligations under the separation agreement and Ms. Ladner's entitlement to maintenance became merged in the judgment of June 12, 1998, the basis upon which Ms. Ladner's damages were awarded must be borne in mind in interpreting paragraph 2 of the order. The expectation in June, 1998 was that L-One Holdings Ltd. would be unable to recover its claim against the estate and thus would be unable to make any payments to Ms. Ladner. Accordingly, in assessing Ms. Ladner's damages the contingency of the receipt by her of monies from L-One

Holdings Ltd. was not taken into account. Mr. Gurney now tells the Court that monies will flow to L-One Holdings and thus, I infer, will be available to reduce at least in part the estate's obligation under the judgment recovered by Ms. Ladner. To hold that the judgment must be satisfied in full before any monies received from L-One Holdings are assigned to the estate would contradict the very basis upon which the award was made and the terms of the order of June 12th, 1998. Moreover, full recovery of the judgment remains unlikely, I am told. To insist on satisfaction in full of the judgment before any L-One monies are assigned to the estate would in all probability result in no L-One funds being assigned contrary to the basis of the award and to the order.

[17] In the meantime, the appellant had applied in both the divorce proceeding (Vancouver Registry No. D069346) and the estate proceeding (Kelowna Registry No. 17063) for an order that her "claim for award of damages pursuant to the Order of Mr. Justice Scarth dated June 12, 1998 is a priority claim of the estate of Hugh Graham Ladner".

[18] Scarth J. dismissed the application: *Re Ladner Estate* (2001), 27 C.B.R. (4th) 82, 39 E.T.R. (2d) 253, 2001 BCSC 943. The essence of his reasoning is found at para. 34 of his reasons for judgment:

Given the absence of any link between the three insurance policies and Mr. Ladner's obligation under the separation agreement Mr. Ladner's claim as against the insurance policies based on an action for unjust enrichment and the remedy of constructive trust must fail. Moreover, it seems to me that Ms. Ladner's claims are merged in the award of damages and disentitles her to claim as against specific assets of the Estate in priority to other claimants.

[19] Earlier in his reasons, at paras. 31 and 32, Scarth J. had written:

I pause to note that in delivering the reasons for judgement of the Court of Appeal on February 25, 1997, Mr. Justice Esson stated with reference to the policies which gave rise to those insurance proceeds:

There is no evidence which directly supports the theory that Mr. Ladner took out that insurance to meet his obligation under clause 7 [of the separation agreement].

This in my opinion distinguishes the cases of *Phillips v. Spooner*, [1979] 2 W.W.R. 473 (Sask. Q.B.); *Steeves v. Steeves*, [1995] N.B.J. No. 473; and *MacLean v. MacLean Estate*, [1998] N.B.J. No. 26, relied upon by Mr. Ashcroft.

[20] Counsel for the appellant correctly points out the "insurance" to which Esson J.A. was referring in that passage was the three lapsed policies Mr. Ladner had obtained through the Canadian Bar Association, not any of the three policies the proceeds of which were the subject of the application before Scarth J.

[21] The appellant considers Scarth J. erred in finding the appellant's damages award was not a priority claim of the estate; in failing to address the appellant's argument that the intention of the law of contract is that the appellant be placed in the same position she would have been in had the contract been performed; in holding there was no link between the

Confederation Life, Aetna Life and Great West Life policies in existence at the time of Mr. Ladner's death and his obligation under the separation agreement; and in holding that the appellant's claims merged with the award of damages thereby disentitling her to claim against specific assets of the estate in priority to other claimants.

- [22] As we shall see, these submissions depend on general principles that have not been applied to a factual situation like the one we are called upon to consider.

Analysis

Contract principles

- [23] The appellant's submission is that the law of contract does not permit a party (or his estate) to "gain an advantage from the party's own wrongful act": *New Zealand Shipping Company Limited v. Société des Ateliers et Chantiers de France*, [1919] A.C. 1 (H.L. (Eng.)) [New Zealand Shipping], applied in *Zippy Print Enterprises Ltd. v. Pawliuk* (1994), 100 B.C.L.R. (2d) 55 (C.A.) [Zippy Print]. In *New Zealand Shipping*, the House of Lords commented in obiter dicta that a clause specifying that an agreement was void on the happening of a particular event could not be invoked by a party to the agreement whose wrongful act caused that event to occur. As Lambert J.A. noted at para. 24 of *Zippy Print*, that proposition has been applied in many cases since decided, with respect to both voiding clauses and termination clauses. However, I see nothing in that proposition that provides guidance to the resolution of this case. At its highest, that proposition would preclude a wrongdoer from invoking the assistance of a court to prosecute or defend an action in contract. It does not confer a property right or priority on the other party to the contract.
- [24] The appellant also relies on excerpts from two texts where scholars explain why an award of damages for breach of contract should be measured by the value the performance would have had if actually rendered. That is the measure the trial judge used. The problem here is not with the quantification of damages; it is with recovery of the award. Neither Professor Waddams (in S.M. Waddams, *The Law of Contracts*, 4th ed. (Toronto: Canada Law Book, 1999)) nor the learned authors of Harvin D. Pitch and Ronald M. Snyder, *Damages for Breach of Contract*, 2d ed. looseleaf (Toronto: Carswell, 1989) suggest for breach of contract any remedy other than a money award where specific performance is not claimed, or as in this case, is abandoned.
- [25] I do not agree with the suggestion of the appellant's counsel that Johnson C.J.Q.B. ruled otherwise about circumstances somewhat similar to those of the Ladners, when he wrote in *Phillips v. Spooner*, [1979] 2 W.W.R. 473 (Sask. Q.B.) at 477:

With the utmost deference, if a judgment is given in favour of the plaintiff based on the contract respecting the insurance policies, surely it could not be the intent of the legislation to deprive the plaintiff of the fruits of her success. While she may become a judgment creditor, surely she cannot be classified as an ordinary creditor when she seeks to obtain the proceeds of the

insurance policies which the deceased agreed to maintain in force and effect for her benefit. In any event, if I am wrong in that view, there are substantial other assets in the estate to which the plaintiff may look for recovery of any amount awarded to her without compelling the executrix to pay over the proceeds of the insurance policies paid to her personally.

- [26] In that passage the Chief Justice was interpreting s. 157 of the Insurance Act, R.S.S. 1965, c. 143, invoked by Dr. Spooner's second wife to defend the first wife's claim for the proceeds of insurance policies the second wife had received following Dr. Spooner's death. That section protected insurance proceeds paid to a designated beneficiary from claims of creditors of the insured.
- [27] Dr. Spooner had breached his separation agreement by changing the beneficiary of seven life insurance policies from his first wife to his second following the first wife's remarriage in 1973. He changed the beneficiary of an eighth policy to his son. The first wife was claiming the face value of all eight policies. In the result, the Chief Justice did not grant a remedy against the second wife. Instead, he allowed the first wife to amend her claim to plead the breach by Dr. Spooner, and awarded damages against the estate in the amount the second wife had actually received, about one-half of the face amount of the policies.
- [28] The other case cited in support of the argument founded in contract is *MacLean v. MacLean Estate*, [1998] N.B.J. No. 26 (Q.B. (Fam. Div.)) (QL) [MacLean]. It provides the strongest support for the appellant's claim because its facts more closely resemble those we are considering. Mr. McLean had agreed to maintain a \$300,000 life insurance policy of which his wife was beneficiary to secure his obligations under a domestic contract. He allowed that policy to lapse and took out a new policy naming his estate as beneficiary. On his death, the administrator of his estate sought to apply the proceeds of the new policy for the benefit of the insolvent estate's creditors. The issue was whether his ex-wife was entitled to the insurance proceeds, and if not, the appropriate award of damages.
- [29] Graser J. found that Mr. MacLean had committed a "flagrant breach of his contractual obligations" (para. 36) and that his ex-wife was entitled under the contract to the arrears of child and spousal support, to spousal support payable until the termination date of the contract, to certain educational expenses she had incurred and to repayment of an obligation to a bank. The balance of the insurance proceeds after payment of the administrator's costs were also to be paid to her, to be held in trust for Mr. MacLean's only heirs, their children. He neither cited authority for his decision, nor explained his legal reasoning, before concluding with this comment at para. 43:

The foregoing takes into consideration that Mrs. MacLean was not entitled to any support after October 31, 2006 and the creditors (who apparently have no interest) should not be entitled to share in proceeds that came to the estate only because of deceased's breach of contract.

- [30] This is not persuasive authority for giving priority to the appellant's claim over those of other creditors who may also be alleging that they too suffered a loss by reason of a wrong done to them by Mr. Ladner. On the submission made on this appeal, I am not persuaded contract law makes available the remedy the appellant seeks.
- [31] In each of the other cases cited in support of a contractual remedy, the trial judge imposed a constructive trust, whether over pension benefits (*Gregory v. Gregory* (1994), 92 B.C.L.R. (2d) 133 (S.C.)) or insurance proceeds (*Steeves v. Steeves* (1995), 168 N.B.R. (2d) 226 (Q.B. (T.D.))). As Scarth J. recognized in the court below, that is the only possible remedy open to the appellant. *Phillips v. Spooner and MacLean*, *supra*, are probably best viewed as implicitly decided on an equitable basis.

Merger

- [32] The next question is that raised by the respondent, namely whether Scarth J. should have considered the remedy of constructive trust. The respondent submits not, arguing that the appellant elected to seek an award of damages and is now estopped from seeking to convert her damages award into a beneficial interest in the insurance proceeds by way of a remedial trust.
- [33] The appellant replies that she was unaware of the estate's insolvency when she elected to receive an award of damages and abandoned her claim for specific performance, as was this Court when it remitted the question of damages to the trial court. It may be the executors were also unaware of the claims of L-One and Secret when the appeal was heard, or that the economic utility of those claims only became apparent upon the release of the reasons of this Court holding Mr. Ladner had breached the separation agreement. Those claims and the cost of defending the appellant's actions seem to have combined to cause the insolvency.
- [34] It was clear, however, to both the appellant and her counsel when the November 1997 application was heard and when the order for damages was entered that the estate was insolvent. While the record is skimpy, it seems likely the first notice the appellant received of the executors' opinion to that effect came when they applied for funding for legal and accounting services on the eve of the assessment of damages.
- [35] Alternatively, the respondent relies on the doctrine of *res judicata*. First, the estate submits, because Parrett J. rejected the appellant's claim that the Great West Life policy was subject to a constructive trust and that aspect of his judgment was not appealed, that issue is *res judicata*. Second, because Esson J.A. noted there was no evidence before Parrett J. upon which a finding could be made that the Aetna Life and Confederation Life policies were those to which the separation agreement referred, there is no evidence to establish the link said to be necessary to found a claim for the imposition of a constructive trust over the proceeds of those policies.

- [36] As to the respondent's second line of argument, Parrett J.'s findings were made in the course of identifying and reapportioning family assets. The fact the Great West Life policy is not a family asset, like the apportionment of the other two policies, is not relevant to a determination of whether a court may consider the remedy of constructive trust for wrongful conduct giving rise to unjust enrichment. They would be relevant, however, to a decision whether to grant an equitable remedy. With respect to the respondent's first line of argument, I agree with the appellant that her claim to a constructive trust based on the enrichment of Mr. Ladner's estate by his breach of contract was never considered by a court before the hearing by Scarth J. of the application for priority. This is not surprising. In the appellant's original application heard by Parrett J., the only interest she claimed in any of the three policies with which this appeal is concerned was to her share of a family asset under Part 5 of the Family Relations Act.
- [37] The appellant takes the view the issue of priority arose only when it became apparent the estate was insolvent. Consequently, she submits, the "award" of damages was the quantification of her claim under the separation agreement, but it remained for Scarth J. to determine how that award was to be received.
- [38] Neither counsel provided the court with any authorities addressing the doctrines of election, merger, or res judicata, nor does it appear that they provided any to Scarth J. The absence of thorough submissions on this point may be explained by the novelty of the appellant's grounds for seeking priority, and particularly the dearth of appellate authority to support them. It may also be explained by the similarity of the policy considerations underlying the doctrines of merger and election, as well as those of res judicata in both its manifestations (cause of action estoppel and issue estoppel), collateral attack and abuse of process, as most recently explained in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 [City of Toronto].
- [39] Underlying these overlapping doctrines are the principles of judicial economy, consistency, finality and integrity of the administration of justice, and the judicial policies those doctrines reflect: there must be an end to litigation and no one should be twice vexed for the same cause (*City of Toronto*, supra at para. 38).
- [40] In *City of Toronto*, supra, Arbour J., writing for the majority, suggests at para. 55 that "the common law doctrines of issue estoppel, collateral attack, and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant". Thus did the majority reject as unnecessary any endorsement of a freestanding and independent principle to preclude relitigation of an issue favoured by the Ontario Court of Appeal in that case.
- [41] The Supreme Court did not, however, address the concern raised in this case - that the respondent is being twice vexed for the same wrong because the appellant is no longer satisfied with the remedy she sought and obtained, namely an order to pay damages. The wrong was Mr. Ladner's failure to name the appellant as beneficiary of insurance he was

maintaining. The consequence was her loss of priority with regard to the payment of some or all of the insurance proceeds. As counsel recognized, these facts do not evoke issue estoppel, collateral attack or abuse of process. They do, however, give rise potentially to the application of the doctrines of election, merger and cause of action estoppel.

- [42] A classic explanation of the rationale for the doctrine of merger is found in the reasons of Tindal C.J. in *Smith v. Nicolls* (1839), 5 Bing N.C. 208 at 220:

The ground on which a plea of judgment recovered bars the Plaintiff from any further action is, that the original nature of the debt, or damage, where it may be sought to be recovered, is changed: that he has a higher remedy; he has a judgment in a court of record of which he can issue an immediate execution: and inasmuch as an immediate execution could be issued on his judgment, it would be a very superfluous matter, and give great encouragement to litigation, if he were allowed to commence de novo, and bring another action on that which was the original ground of complaint.

Therefore, it has been always held, that whether in an action of debt or for damages, the cause of action has itself merged and become extinguished in a remedy of a higher nature, where there is a judgment obtained in a court of record in this country.

- [43] Tindal C.J. was considering the defence that the plaintiff had already recovered for the same cause of action in the Court of Vice-Admiralty of Sierra Leone. After finding that the Vice-Admiralty Court's judgment did not appear decisive and binding between the parties even in the colony of Sierra Leone, the court held it could not be "conclusive in the nature of an estoppel between the parties" (at 222, per Tindal C.J.) and gave judgment for the plaintiff.

- [44] From this explanation the doctrine of merger may be seen as one form of cause of action estoppel. However, in the course of a helpful discussion of *res judicata* in K.R. Handley, *The Doctrine of Res Judicata*, 3d ed. (London: Butterworths, 1996), Justice Handley suggests (at 221) the two doctrines can be distinguished for the purpose of analysis:

Res judicata has a twofold operation. It estops the parties to a decision from afterwards controverting any issue thereby decided and it bars the party who has obtained relief from seeking it again. This distinction was explained by Diplock LJ in *[Thoday v Thoday, [1964] P. 181 (C.A.)]*:

" cause of action estoppel prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the parties. If the cause of action was determined to exist i.e. judgment was given upon it, it is said to be merged in the judgment. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam".

The rule as to merger may be stated as follows: any person in whose favour an English judicial tribunal of competent jurisdiction has pronounced a final judgment, civil or criminal, is precluded from afterwards recovering before any English tribunal a second judgment against the

same party on the same cause of action, or a second conviction for the same offence. A plea of this nature is distinguishable from *res judicata* estoppel in two respects: in the first place, the latter prohibits contradiction, the former reassertion; secondly, that which must not be controverted, in cases of estoppel, is the proposition of law, or finding of fact, declared by, or necessarily involved in, the *res judicata*, whereas, in cases of former recovery what is not allowed is a second action for the relief previously granted.

[45] At 227, the requirement of "recovery" is explained:

"Recovery" means recovery of the relief granted; it does not mean satisfaction. The cause of action is merged in the judgment when pronounced; what happens afterwards is irrelevant. Accordingly, a plea of former recovery is good although the judgment is unsatisfied or the plaintiff elected to abandon his rights to execution, by *nolle prosequi*, or other formal act after judgment. Nor is it any answer to a former recovery to show that, by suing in one of two possible causes of action, the plaintiff recovered less than he would if he had sued in the other.

[46] In Justice Handley's discussion (at 230), the concept of election emerges from the application of the doctrine of merger (or former recovery) to different causes of action:

In general, a former judgment does not operate as a bar unless the later proceedings are founded on the same "cause of action". However where a plaintiff has alternative remedies against the same defendant he can only recover on one and must elect. In [United Australia Ltd v. Barclays Bank Ltd, [1941] A.C. 1] the plaintiff had alternative remedies in tort for conversion of its cheque and in restitution for money had and received. Lord Atkin said that the plaintiff "was restricted to one of the two remedies Having recovered in contract [it] cannot recover in tort. Transit in *rem judicatam*"; and later "on a question of alternative remedies no question of election arises until one or other claim has been brought to judgment. Up to that stage the plaintiff may pursue both remedies together, or pursuing one may amend and pursue the other: but he can take judgment only for the one and his cause of action on both will then be merged in the one". These principles were applied in [Mahesan S/O Thambiah v. Malaysian Housing Society, [1979] A.C. 374] where it was held that a principal was not entitled to judgment against its bribed agent for damages for fraud and the bribe as money had and received. A similar situation arises where a plaintiff has alternative remedies either for damages or equitable compensation or an account of profits. The plaintiff must elect between compensation or restitution when taking judgment. However where the trial court erroneously entered judgment for damages and an account of profits without requiring the plaintiff to elect, the Privy Council held [in *Personal Representatives of Tang Man Sit v. Capacious Investments Ltd.*, [1996] A.C. 514] that the plaintiff could elect later. A plaintiff is entitled to make an informed choice, which may require further time or additional discovery [citing *Island Records Ltd. v. Tring International plc*, [1996] 1 W.L.R. 1256 and *Warman International Ltd. v. Dwyer* (1995), 182 C.L.R. 570].

[47] It seems right that a factual situation that gives a person a cause of action (in this case, Mr. Ladner's breach of contract) should be the subject of only one action, unless the dictates of fairness and justice require a second action. The leading case suggesting the contrary,

Brunsdon v. Humphrey (1884), 14 Q.B.D. 141, is no longer good law in Canada: Cahoon v. Franks, [1967] S.C.R. 455. As Diplock L.J. commented in Letang v. Cooper, [1965] Q.B. 232 at 242-43, "a cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person".

- [48] Cause of action estoppel precludes a person from bringing a second action for the same cause of action that was earlier dismissed: Henderson v. Henderson (1843), 3 Hare 100; Angle v. Minister of National Revenue, [1975] 2 S.C.R. 248; Doering v. Grandview (Town), [1976] 2 S.C.R. 621; Morgan Power Apparatus Ltd. v. Flanders Installations Ltd. (1972), 27 D.L.R. (3d) 249 (B.C.C.A.); Lim v. Lim, 1999 BCCA 596.
- [49] If a cause of action is seen, as I think it must be, as the factual situation giving rise to the right to claim a remedy, consistency requires the same result ensue where the previous claim was allowed and a remedy granted. Nothing turns, in my view, on the fact the claim for a different remedy is brought in the existing action and by way of a claim for priority in an estate proceeding.
- [50] This appeal comes, I think, to the question of whether, by entering judgment for damages, the appellant elected to forego her claim for an equitable remedy, and whether, if she did, there is reason in the record to allow the claim to proceed in any event, as there was in Hoque v. Montreal Trust of Canada (1997), 162 N.S.R. (2d) 321 (C.A.), leave to appeal to S.C.C. refused, [1997] S.C.C.A. No. 656 (QL).
- [51] Although not pleaded before Parrett J. and the Court of Appeal, the appellant sought to establish a constructive trust over the Canadian Bar Association policies. That claim was properly rejected. The appellant abandoned her claim for specific performance of the separation agreement, and sought no other equitable remedy over the three policies with which this appeal is concerned or any of the other estate assets. When she learned of the estate's alleged insolvency, the appellant did not seek to amend her pleadings, to allege a "good conscience" trust. Nor did she seek an adjournment of the hearing to assess damages so she might reconsider her position or attempt to lead new evidence. Scarth J. assessed damages; his order was entered and not appealed. After the order was interpreted in a manner unfavourable to her, the appellant did not apply to extend the time for appeal. No new material facts have since come to light.
- [52] In these circumstances there was good reason to apply the doctrines of election and merger to preclude any consideration of the claim for a constructive trust remedy. I do not see Scarth J. as having erred when he held that once the appellant elected to enter an order for payment of damages, her cause of action merged in that order and ceased to exist. The litigation was at an end.

Conclusion

[53] For these reasons I would dismiss the appeal. In doing so, I do not wish to be seen as suggesting a remedial good conscience constructive trust may not be imposed over insurance proceeds in an appropriate case on the analysis in *Soulos v. Korkondzilas*, [1997] 2 S.C.R. 217 and *Roberts v. Martindale* (1998), 55 B.C.L.R. (3d) 63 (C.A.).

"The Honourable Madam Justice Huddart"

I agree:

"The Honourable Madam Justice Rowles"

I agree:

"The Honourable Mr. Justice Oppal"

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